

UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA

In re:	)	2:10-cv-00726-ECR-GWF
	)	
BARBARA MELINDA HENSON,	)	
	)	<u>Order</u>
Debtor.	)	
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	)	
BRIAN D. SHAPIRO, TRUSTEE OF THE	)	
BANKRUPTCY ESTATE OF	)	
BARBARA MELINDA HENSON,	)	
	)	
Appellant,	)	
	)	
vs.	)	
	)	
BARBARA MELINDA HENSON,	)	
	)	
Appellee.	)	
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This case is an appeal from an order of the bankruptcy court, docketed on May 6, 2010, denying Appellant's "Motion for Turnover of Funds in Addition to Motion to Extend Time to Object to Discharge." The question presented by the appeal is whether, under 11 U.S.C. § 542(a), a debtor who was in possession of non-exempt funds at the time of filing bankruptcy is required to turn over the value of those funds to the trustee when she no longer has possession of the funds when the motion for turnover is filed. The bankruptcy court ruled that possession is required for turnover. For the reasons stated below, the bankruptcy court's order will be affirmed.

1                                    **I. Factual and Procedural Background**

2            On August 7, 2009, Barbara Melinda Henson ("Appellee" or  
3 "Debtor") filed a Chapter 7 bankruptcy proceeding. (Appellant's  
4 Opening Br. Ex. 1 (#7-2).) On that date, Brian D. Shapiro  
5 ("Appellant" or "Trustee") was appointed as the Chapter 7 Trustee.  
6 (Appellant's Opening Br. Ex. 2 (#7-3).) Debtor provided Trustee  
7 with bank statements reflecting that as of August 7, 2009, when  
8 Debtor filed for bankruptcy, Debtor maintained a balance in her  
9 account in the amount of \$6,155.19<sup>1</sup> which was not claimed to be  
10 exempt. (Appellant's Opening Br. Ex. 3, 5 (##7-3, 7-4).) Trustee  
11 made demand for the nonexempt funds in the amount of \$6,155.19, but  
12 Debtor did not provide the funds. (Appellant's Opening Br. Ex. 4, 6  
13 (##7-4, 7-5).)

14            On November 10, 2009, Trustee filed a "Motion for Turnover of  
15 Funds in Addition to Motion to Extend Time to Object to Discharge."  
16 (Appellant's Opening Br. Ex. 4 (#7-4).) On November 20, 2009,  
17 Debtor filed her opposition to the motion for turnover.  
18 (Appellant's Opening Br. Ex. 6 (#7-5).) Debtor disclosed that  
19 \$3,239.00 of the \$6,155.19 had been transferred to Debtor's  
20 bankruptcy counsel after the filing of the bankruptcy case. (Id.)  
21 At a hearing held on December 16, 2009, Trustee orally amended his  
22 motion for turnover to exclude the amounts transferred to Debtor's

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24            <sup>1</sup> We note that there is a discrepancy between Appellant and Appellee's  
25 statement of the facts regarding the total amount that was non-exempt. The  
26 statement of facts contained in Appellant's opening brief provides that the amount  
27 initially sought was \$6,955.19 rather than \$6,155.19. (Appellant's Opening Br. at  
28 5 (#7).) Appellee explains, in her answering brief, that \$800 of that \$6155.19 was  
exempt. (Appellee's Answering Br. at 7 (#8).) Appellant does not expressly address  
this argument, but the amount he ultimately seeks through his motion for turnover  
is in accordance with Appellee's statement that \$800 of the \$6,955.19 was exempt.

1 counsel, which he pursued separately. (Appellant's Opening Br. Ex.  
2 7 (#7-6).)

3 At a hearing held on April 19, 2010, the bankruptcy court  
4 denied Trustee's motion for turnover. (Appellant's Opening Br. Ex.  
5 11 (#7-8).) The order denying the motion was docketed on May 6,  
6 2010. (Appellant's Opening Br. Ex. 12 (#7-8).) On May 17, 2010,  
7 Trustee appealed the bankruptcy court's denial of his motion for  
8 turnover. On the same date, Trustee filed an election to have the  
9 appeal heard by the United States District Court.

10 Appellant's opening brief (#7) was filed on February 3, 2011.  
11 Appellee's answering brief (#8) was filed on February 23, 2011.  
12 Appellant's reply brief (#9) was filed on March 9, 2011.

## 13 14 **II. Jurisdiction**

15 The district courts have jurisdiction to hear appeals from  
16 "final judgments, orders, and decrees" of the bankruptcy court  
17 pursuant to 28 U.S.C. § 158(a)(1), as well as certain interlocutory  
18 orders described in 28 U.S.C. § 158(a)(2). A party may also, "with  
19 leave of the court," appeal from other interlocutory orders and  
20 decrees pursuant to 28 U.S.C. § 158(a)(3). See In re City of Desert  
21 Hot Springs, 339 F.3d 782, 787 (9th Cir. 2003) (noting that the  
22 district court must hear appeals from final decisions of the  
23 bankruptcy courts, but it is within the discretion of the district  
24 court to hear appeals of interlocutory orders).

25 Here, the bankruptcy court's order with respect to Appellant's  
26 motion constitutes a final order within the meaning of 28 U.S.C.  
27 § 158(a)(1) because it represents the bankruptcy court's final  
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1 resolution of the parties' rights with regard to Appellant's claim.  
2 See id. at 788 (describing the Ninth Circuit's "'pragmatic' approach  
3 to deciding whether orders in bankruptcy cases are final,  
4 'recognizing that certain proceedings in a bankruptcy case are so  
5 distinct and conclusive either to the rights of individual parties  
6 or the ultimate outcome of the case that final decisions as to them  
7 should be appealable as of right.'" (quoting In re Mason, 709 F.2d  
8 1313, 1317 (9th Cir. 1983)). As such, we have jurisdiction over the  
9 appeal pursuant to section 158(a).

### 10 11 III. Standard of Review

12 We review the bankruptcy court's interpretation of 11 U.S.C. §  
13 542(a) *de novo*. In re LPM Corp., 300 F.3d 1134, 1136 (9th Cir.  
14 2002).

### 15 16 IV. Discussion

17 The bankruptcy court held that the checks written pre-petition  
18 by Debtor became property of the estate because they had not been  
19 honored when Debtor filed for bankruptcy. Despite this conclusion,  
20 the bankruptcy court held that because Debtor no longer had  
21 possession of the funds when the motion for turnover was filed,  
22 Trustee could not compel turnover of the value of those funds  
23 pursuant to 11 U.S.C. § 542(a). 11 U.S.C. § 542(a) provides that:

24 Except as provided in subsection (c) or (d) of  
25 this section, an entity, other than a custodian,  
26 in possession, custody, or control, during the  
27 case, of property that the trustee may use, sell,

1 or lease under section 363 of this title, or that  
2 the debtor may exempt under section 522 of this  
3 title, shall deliver to the trustee, and account  
4 for, such property or the value of such property,  
5 unless such property is of inconsequential value  
6 or benefit to the estate.

7 Currently, Courts of Appeals are split on whether a trustee can  
8 compel turnover from an entity that no longer has possession of the  
9 property. The Fourth and Seventh Circuits and the Sixth Circuit  
10 bankruptcy appellate panel do not require possession. In re  
11 Shearin, 224 F.3d 353 (4th Cir. 2000); In re USA Diversified Prods.,  
12 Inc., 100 F.3d 53 (7th Cir. 1996); In re Bailey, 380 B.R. 486 (6th  
13 Cir. BAP 2008). The Ninth Circuit has not ruled on this particular  
14 issue. The Eighth Circuit, however, requires possession. In re  
15 Pyatt, 486 F.3d 423 (8th Cir. 2007). The bankruptcy court in this  
16 case based its holding on the Eighth Circuit's interpretation of  
17 U.S.C. § 542(a) in Pyatt. The court in Pyatt faced a set of facts  
18 remarkably similar to those in this case, and found that when a  
19 debtor writes checks pre-petition that are honored post-petition,  
20 the debtor is not required to turn over the value of the funds under  
21 sec. 542(a). Id. The Eighth Circuit based its decision in part on  
22 a pre-Bankruptcy Code case holding that a trustee may compel  
23 turnover only from entities which have control of property of the  
24 estate or its proceeds at the time of the turnover demand. Id.  
25 428; see also Maggio v. Zeitz, 333 U.S. 56 (1948).

26 The Fourth and Seventh Circuit, as well as the Sixth Circuit  
27 bankruptcy appellate panel, hold that possession is not required  
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1 because of the language in sec. 542(a) that an entity shall deliver  
2 the property, or the value of such property. See In re Shearin, 224  
3 F.3d at 356; In re USA Diversified Prods., 100 F.3d at 56; In re  
4 Bailey, 380 B.R. at 492. We agree with the reasoning in Pyatt, in  
5 which the Eighth Circuit considered that argument and expressly  
6 rejected it. In the pre-Bankruptcy Code case Maggio, the Supreme  
7 Court reversed the lower court's contempt order on a debtor who was  
8 unable to turnover property of the estate that it no longer  
9 possessed. 333 U.S. at 77. In short, pre-Code practice was that  
10 turnover "is appropriate only when the evidence satisfactorily  
11 establishes the existence of the property or its proceeds, and  
12 possession thereof by the defendant at the time of the proceeding."  
13 Id. at 63-64. The Supreme Court further clarifies that courts  
14 should not look to the date of bankruptcy as the time to which the  
15 inquiry of possession is directed, but rather to the time that a  
16 turnover proceeding is instituted. Id. at 64. In this case, Debtor  
17 does not possess the property or the proceeds of the property.  
18 There is no allegation of fraudulent intent on her part when she  
19 wrote the checks pre-petition. Therefore, under pre-Code practice,  
20 Debtor would not be required to turn over the funds Trustee now  
21 seeks. The Bankruptcy Code does not expressly change this result.  
22 The language requiring turnover of the value of the funds may simply  
23 correspond to the pre-Code practice of allowing turnover of the  
24 proceeds of the property. If the Bankruptcy Code was intended to  
25 abrogate the established pre-Code practice of requiring possession  
26 of the property or its proceeds, such intention could have been  
27 expressed more clearly.

1 Nor is Trustee left without an adequate remedy under the  
2 interpretation that a motion to compel turnover may only succeed  
3 when the entity has current possession of the property. Unlike the  
4 turnover provision, which governs the duty of an entity in  
5 possession of property of the estate during the case to turn over  
6 the property or the value of such property, sec. 549 expressly  
7 provides that "the trustee may avoid a transfer of property of the  
8 estate" that occurs post-petition. 11 U.S.C. § 549(a); see also In  
9 re Pyatt, 486 F.3d at 428. In this case, Trustee chose not to  
10 prosecute the creditors who received the funds post-petition from  
11 checks written pre-petition, but does not dispute that he had the  
12 option of doing so in order to recover the funds.

13 Finally, we note that under Trustee's interpretation of sec.  
14 542(a), Trustee might have obtained double satisfaction by  
15 proceeding against the debtor through a motion for turnover, and  
16 against the creditors through motions to avoid post-petition  
17 transfers of property of the estate. See In re Pyatt, 486 F.3d at  
18 427-428. If possession is not required, nothing in sec. 542(a) or  
19 the provision governing double satisfaction would prevent Trustee  
20 from doing so. 11 U.S.C. §§ 542(a), 550(d). Double satisfaction  
21 under sections 544, 545, 547, 548, 549, 553(b), or 724(a) is  
22 expressly prohibited under 11 U.S.C. § 550(d). That provision does  
23 not include any reference to sec. 542(a), and the absence of such a  
24 prohibition lends credence to our interpretation that sec. 542(a)  
25 requires present possession of the property or its proceeds. Our  
26 interpretation would neatly limit the appropriate defendants of a  
27 turnover proceeding and the possibility of double satisfaction

1 without resort to an express provision such as sec. 550(d), as well  
2 as being in accordance with pre-Code practice. See In re Pyatt, 496  
3 F.3d at 427-428.

4 For the foregoing reasons, we conclude that a trustee may not  
5 compel turnover from an entity unless the entity is in present  
6 possession<sup>2</sup> of the property sought, or its proceeds, and therefore,  
7 the bankruptcy court's denial of Appellant's motion for turnover  
8 will be affirmed.

#### 9 10 V. Conclusion

11 Under 11 U.S.C. § 542(a), a trustee may not compel turnover of  
12 property of the estate unless the entity against whom the trustee  
13 seeks turnover is in possession of the property sought, or its  
14 proceeds, at the time the motion for turnover is filed. In this  
15 case, Debtor was not in possession of the funds Trustee seeks, nor  
16 its proceeds, when the motion for turnover was filed. Therefore,  
17 the bankruptcy court's order denying Trustee's motion for turnover  
18 will be affirmed.

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21 IT IS, THEREFORE, HEREBY ORDERED that the bankruptcy court's  
22 Order of May 6, 2010, denying Appellant's "Motion for Turnover of  
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25 <sup>2</sup> A different question is presented when an entity in possession of property  
26 of the estate at the time a motion for turnover is filed transfers possession rather  
27 than complying with such motion or order of the bankruptcy court. At the very  
28 least, such circumstances would require an inquiry into fraudulent intent. That  
issue is not presented here, and we do not address any remedies the bankruptcy court  
or a trustee may have under such circumstances.



1 Funds in Addition to Motion to Extend Time to Object to Discharge"  
2 is **AFFIRMED**.

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4 The Clerk shall enter judgment accordingly.

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6 DATED: March 29, 2011.

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Handwritten signature of Edward C. Reed in black ink.

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UNITED STATES DISTRICT JUDGE

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